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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MULTI-STATE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, RKO GENERAL, INC., COMMUNITY BROADCASTING OF BOSTON, INC., NEW ENGLAND TELEVISION CORPORATION, THE DUDLEY STATION CORPORATION, AND FIDELITY TELEVISION, INC.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Court of Appeals affirmed a decision of the Federal Communications Commission[1] that declared that RKO General, Inc., was not qualified to be the licensee of television Station WNAC-TV, Boston, Massachusetts.

In companion orders the Commission also found RKO General, Inc., unqualified to be the licensee of station KHJ-TV, Los Angeles, California,[2] and likewise unquali-

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[1]RKO General, Inc. (WNAC-TV), 78 FCC 2d 1 (1980)

[2]RKO General, Inc. (KHJ-TV), 78 FCC 2d 355 (1980)

fied to be the licensee of WOR-TV, New York, New York.[3]

The Court of Appeals, however, remanded the Los Angeles (Fidelity) and New York (Multi-State) cases to the Commission for further consideration.

Multi-State had filed its competing application for WOR-TV in New York in 1972, while there were still unresolved character issues against RKO General, Inc., in the Los Angeles (Fidelity) and Boston (Community) dockets.

In the proper exercise of its administrative function, the Federal Communications Commission expressly declared Fidelity to be a party in Boston for all pending matters bearing on RKO's character qualifications, In the Hearing Designation Order[4] in the New York (Multi-State) case the Commission, again in the proper exercise of its administrative authority, ordered that the resolution of the character issues against RKO in Boston would be *res judicata* as to RKO in New York.

RKO was found disqualified in Boston and following its own pre-set administrative procedures, the Commission disqualified RKO in New York and Los Angeles as well.

The Court of Appeals agreed with the Commission that RKO, on the basis of character qualification, was unfit to be a licensee of a broadcast station in Boston. Surprisingly, the Court of Appeals ruled that the RKO misconduct supported RKO's disqualification only in Boston and not in New York or Los Angeles. It incorrectly based this con-

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[3]RKO General, Inc. (WOR-TV), 78 FCC 2d 357 (1980).

[4]RKO General, Inc. (WOR-TV), 46 FCC 2d 246 (1974).

clusion on its reasoning that the misconduct occurred "directly before the trier of fact" only in the Boston Case.

There was nothing parochial about the sins of RKO.

The Commission recognized that important factor when it consolidated the three cases. Such a procedure was entirely correct. Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 145(j), states in pertinent part:

> "The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

Both the Multi-State and Fidelity dockets had unresolved RKO character issues before the Commission at the time the lack of candor on the part of RKO occurred. RKO, in failing to timely notify the Commission of the SEC investigation, also failed to timely notify the Boston, Los Angeles and New York challengers as required by Commission Rules. There was identical lack of candor in all three dockets.

Pursuant to the authority granted by the Communications Act, *supra,* the Commission properly consolidated the character issues *present in all three dockets* into the Boston proceeding.

The Court of Appeals agreed with the Commission that those who seek a grant of a broadcast license in the public interest "have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate" and that "(t)his duty of candor is basic and well known." It concluded that RKO had breached that duty both through its failure to report to the Commission the initiation of a formal SEC investigation into widespread misconduct by RKO's sole stockholder and through its

failure to amend or supplement its January, 1976 opposition which, in effect, denied the true charges leveled by Community.

Then, in violation of the Commission's Congressionally endowed authority, the Court of Appeals refused to allow the Commission to consolidate the three cases and ordered a remand of the New York and Los Angeles cases.

Petitioner Multi-State contends that the Court of Appeals improperly intruded upon the procedural discretion of an administrative agency in the management of its hearing dockets. Such improper intrusion is a serious misapplication of a long line of statutory and decisional law which restricts reviewing courts from substituting their own procedures for the properly enacted procedures of administrative agencies, *Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519, 525, (1978).

By its intrusion into the procedural methodology of the Federal Communications Commission, the Court of Appeals has gutted the Commission's statutory grant of broad procedural discretion. This Court has long recognized the Commission's right to this broad procedural discretion. As it noted in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) at 138:

> ". . . when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observed the basic requirements designed for the protection of private as well as public interest."

In line with the "protection of private as well as public interest," delineated in *Pottsville, supra,* the Court should be aware of the necessity for protection of the interest of Multi-State in this proceeding. Multi-State has been prosecuting its challenging application for over ten years at substantial expense in time and money. It was informed over eight years ago, by a Commission acting on statutory authority, that insofar as the character issues of RKO were concerned, the resolution of such issues in the Boston proceeding would be *res judicata* insofar as Multi-State was concerned. Multi-State abided by this valid order of the Commission and rightfully considered its docket as consolidated with the Boston docket regarding the characrter of RKO. It participated in the hearings rightfully ordered by the Commission and responded to all the requests for the filing of pleadings made by the Commission.[5] Then, when the Commission finally reached its decision, as a result, in part, of the Multi-State efforts, the Court of Appeals completely abrogated the Commission's right to procedural discretion and ordered Multi-State to start all over in the prosecution of its application.

The blatant injustice of the Court of Appeals decision is further exacerbated when one noted that in its Opinion (p. 44), the Court of Appeals noted:

> The judgment that RKO showed a lack of candor in the Boston proceeding is *res judicata,* of course, and is not subject to collateral attack in these subsequent proceedings. See id. at 312-18. The Commission may give that finding whatever weight it considers appropriate. *Indeed, it may*

[5]Incidentally, when the Commission, under its authorization from the Communications Act, joined the parties in a single proceeding, RKO raised absolutely no objection to this procedure.

> *well be that such a finding is inconsistent with a licensee holding a licensee anywhere, although that decision is for the Commission in the first instance."* (Emphasis supplied).

Multi-State respectfully suggests that the Commission under the authority granted to it under the Communications Act and supported by this Court's holding in *Vermont Yankee, supra* had already made that decision. The Multi-State case should not be remanded for further unnecessary hearings.

The remand of the New York case for further proceedings if allowed to stand, could have serious impact in the future on the method in which administrative agencies would be permitted to carry out their functions mandated by Congress. Tremendous duplication of effort, with its inherent cost of time and money would result.

For the above mentioned reasons, certiorari should be granted.

Respectfully submitted,

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